Supreme Court, U.S.
FILED
MAY 23 1991
OFFICE OF THE CLERK

No. 90-1680

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

REGINA BROWN, Administratrix and Administratrix Ad Prosequendum of the Estate of Debbie Evans,

Petitioner,

vs.

DETECTIVE FELIX GRABOWSKI, individually and as a police officer of the Roselle Police Department, New Jersey; PATROLMAN WILLIAM SCHWARTZ, individually and as a police officer of the Roselle Police Department, New Jersey; CHIEF VINCENT F. TROLAN, individually and as Chief of the Roselle Police Department, New Jersey; ROSELLE POLICE DEPARTMENT; and THE BOROUGH OF ROSELLE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Petitioner has asked this Court to review the decision rendered in this matter by the United States Court of Appeals for the Third Circuit. She contends that the Court below erred when it held that the right of a victim of domestic violence to receive the same

protectior
as of Jan on as a victim of other crimes was not clearly established
Harlow v nuary, 1985 for purposes of qualified immunity under
that the T v. *Fitzgerald*, 457 U.S. 800 (1982). She also contends
not violat Third Circuit erred when it found that respondents did
to access t ate Debbie Evans' clearly established constitutional right
are neithe to the courts. This relief should be denied because there
issues rais her conflicting decisions among various courts on the
10.1(a) an ised in the petition, as required by Supreme Court Rule
have not l and (b), nor any important issues of federal law which
tioner ha been decided, as required by Rule 10.1(c). Further, Peti-
considera as misstated some of the facts relevant to this Court's
follow, P ation of the issues raised herein. For the reasons that
denied. Petitioner's petition for writ of certiorari should be

I

DEBBIE EVANS' RIGHTS WERE NOT CLEARLY ESTABLISHED FOR PURPOSES OF ANDERSON V. CREIGHTON

Petitioner seeks review of the holding of the Third Circuit that Debbie Evans' right to not be provided with less police protection because she was a victim of domestic violence was not "clearly established" in January, 1985 for purposes of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). For the reasons that follow, the decision of the Court below was both correct and was in accordance with the law of the other Circuits as to what constitutes "clearly established" law. Therefore, Petitioner's petition should be denied.

A government official is entitled to qualified immunity against claims that he violated a citizen's constitutional rights where those rights were not clearly established at the time of the allegedly wrongful conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Id.* The right allegedly violated must be clearly established in a particularized sense.

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law, the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987).

The Court below held that the law regarding discrimination against victims of domestic violence was not clearly established for purposes of *Harlow* because only a single District Court

case from another Circuit, *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), had held that such discrimination was unlawful.

> Our survey of these cases and materials strongly suggests that, in 1985, the equal protection rights of domestic violence victims were far less recognized and defined than they are today. We believe that *Thurman*, *see supra* note 13, a lone district court case from another jurisdiction, cannot sufficiently have established and limned the equal protection rights of a domestic violence victim, such as Evans, to enable reasonable officials to " 'anticipate [that] their conduct [might] give rise to liability for damages.' " *Anderson*, 483 U.S. at 646, 107 S.Ct. at 3042 (quoting *Davis*, 468 U.S. at 195, 104 S.Ct. at 3019).

922 F.2d at 1118; App. at App. 49. The Third Circuit's view that a single District Court decision from another Circuit does not "clearly establish" the law for purposes of qualified immunity is in accord with every other Circuit which has considered the question. *See Muhammad v. Wainright*, 839 F.2d 1422, 1425 (11th Cir. 1987) ("A single district court opinion, particularly from outside the circuit, cannot, in and of itself, settle the law."); *Hawkins v. Steingut*, 829 F.2d 317, 312 (2d Cir. 1987) ("A district court decision does not "clearly establish" the law even of its own circuit, much less that of other circuits"). *See also Hedge v. County of Tippacanoe*, 890 F.2d 4, 7-8 (7th Cir. 1989); *Hensley v. Wilson*, 850 F.2d 269 (6th Cir. 1988) (single opinion from other Circuit court does not "clearly establish" law). Thus, since there is unanimity among the circuits that a single case cannot "clearly establish" the law for purposes of qualified immunity, there is no reason for this Court to exercise its supervisory powers to answer a question that has clearly been answered by the lower courts.

Petitioner contends that Debbie Evans' right not to receive less police protection because she was a victim of domestic violence was clearly established in 1985, relying upon several Supreme Court decisions regarding discrimination. These cases,

however, did not so "clearly establish" the law so that a reasonable official would know that his actions would violate a domestic violence victim's constitutional rights.

On a most general level, there is no question that in January, 1985 it was clearly established that it was a violation of the equal protection clause for an official to treat similarly situated persons differently.

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886). The real question under equal protection analysis is whether a person or group is similarly situated to another group so as to be entitled to the same treatment as the other group. Petitioner cites to four cases from this Court which she contends "clearly established" the law that victims of domestic violence were entitled to be treated the same as victims of other crimes: *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); and *Reed v. Reed*, 404 U.S. 71 (1971). At best, these cases "clearly establish" that irrational distinctions based upon gender violate the Equal Protection Clause. It cannot fairly be said, based upon these cases, that a reasonable official would know that discrimination against domestic violence victims, a subclass of women, would be unconstitutional.

Feeney established a two-part test for determining whether a statutory classification discriminated against women. To make such a determination, a court must first consider whether the classification is indeed gender-neutral. If the classification is facially gender-neutral, the court must go on to consider whether an adverse effect against a given gender reflects invidious gender

based discrimination. *Feeney*, 442 U.S. at 274. Using this test, the Court upheld a Massachusetts statute which gave hiring preference for state jobs to veterans, even though veterans were primarily men. In the other cases relied upon by Petitioner, the Court struck down as unconstitutional explicit, irrational gender-based classifications. *See Craig*, *supra* (drinking age 21 for males, 18 for females); *Frontiero*, *supra* (male service members automatically received dependency allowances for spouses; female service members had to prove dependency); *Reed*, *supra* (statute favoring males over females as administrators of estates).

Petitioner's argument that the foregoing cases which clearly established that irrational discrimination against women violated against the equal protection likewise "clearly established" that domestic violence crimes be treated the same as other crimes is precisely the sort of argument that *Anderson* was designed to protect against. Under Petitioner's reasoning, any action which was ultimately found to have an adverse impact on women, or a group of women, would be unconstitutional, despite the holding of *Feeney*.

> If the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages."

Anderson, 483 U.S. at 639. "A passably clever plaintiff would always be able to identify an abstract clearly established right

that the defendant could be alleged to have violated." *Anderson*, 483 U.S. at 640, n.2. It is a quantum leap to say that cases which established that irrational discrimination against women is unconstitutional likewise "clearly established" for purposes of qualified immunity that victims of domestic violence, a subclass of women,[1] should be given the same treatment as the victims of other crimes.

The Supreme Court cases cited by Petitioner would hardly "both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." *Ohio Civil Service Employees Assn's v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988). In January, 1985 there was but a single case, from a District Court in another Circuit, which had held that domestic violence crimes were not, in fact, different crimes which should be handled differently than other crimes. There is no disagreement among the Circuits that such scant authority does not "clearly establish" the law for purposes of qualified immunity. It is equally clear, contrary to petitioner's suggestion, that the New Jersey Domestic Violence Act did not "clearly establish" Debbie Evans' *constitutional* rights, because a state statute cannot create a federal constitutional right. *See Maine v. Thiboutout*, 448 U.S. 1 (1980).

As set forth above, there is no conflict among the Circuits that a single case from a District Court in another Circuit does not

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[1] The class of victims of domestic violence victims, according to the authorities cited by petitioner, consists primarily, although not exclusively, of women. Petitioner states in her petition, "In the Borough of Roselle, the class of domestic violence victims was comprised almost exclusively of women." (Pet. at 12). While Petitioner has cited to numerous law review articles, studies and some cases that, in general, women are primarily the victims of domestic violence, she has produced no *evidence* as to the distribution between the sexes of domestic victim violence in Roselle, N.J. Further, it is Respondents' position that Petitioner has likewise produced no evidence to show that Debbie Evans, or other domestic violence victims, received *unequal* treatment by the Roselle police, even assuming that it was clearly established in 1985 that such discrimination was wrongful. This issue was not, however, reached by the Third Circuit.

"clearly establish" a constitutional right for purposes of qualified immunity. Petitioner is simply seeking to have the Court review the application of its standard set forth in *Anderson v. Creighton* to a specific factual situation, where the court below correctly applied *Anderson*. Since the incident which forms the subject matter of this suit, the Circuits have clearly, and universally, held that discrimination against victims of domestic violence is a violation of the equal protection clause. *See Hynson v. City of Chester, Legal Dept.*, 864 F.2d 1026 (3d Cir. 1988); *Balistreri v. Pacifica Police Dept.*, 855 F.2d 1421 (9th Cir. 1988); *Watson v. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988). A holding by this Court that such conduct was clearly established as wrongful in 1985 would affect only a handful of cases.

Petitioner has shown no need for this Court to exercise its supervisory powers under Supreme Court Rules 10.1(a) and (b), nor is this an important question of federal law which should be settled by this Court under Rule 10.1(c). Therefore, Petitioner's petition for writ of certiorari should be denied.

II

THE COURT BELOW FOUND THAT RESPONDENTS DID NOT INTERFERE WITH DEBBIE EVANS' RIGHT OF ACCESS TO THE COURTS

Petitioner also argues that Respondents violated Debbie Evans' clearly established right of access to the courts by actively interfering with her attempts to file criminal charges and obtain a protective order. This continuation is contrary to the factual findings of the Court below.

There is no question but that a citizen's right to access to the court is protected by the Constitution. *See Wolff v. McDonnell*, 418 U.S. 539 (1974); *California Motor Transportation Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142 (1907). Affirmative interference with access to the civil courts is a constitutional violation. *See Boddie v. Connecticut*, 401 U.S. 371 (1971); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984); *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983). However, the state has an obligation to assist a citizen in gaining access to the courts only where the citizen is in custody. *See Bounds v. Smith*, 430 U.S. 817 (1977). *Cf. DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) (state has obligation to protect citizen against third-party violence only when citizen is in custody). Petitioner has also cited to three post-*DeShaney* decisions which hold that the state has an obligation under the Constitution to protect citizens against dangers that the state itself creates. *Gregory v. City of Robers*, 921 F.2d 750 (8th Cir. 1990); *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989).

Petitioner argues that Debbie Evans' clearly established right to access to the court was violated because Det. Grabowski actively interfered with her access to the court and assisted in creating the danger to Ms. Evans. (Pet. at 22-23, 26). This argument is directly contrary to the factual findings of the court below. While acknowledging the rule set forth in *Cornelius* and *Wood*, the Third Circuit found that those cases were factually distinguishable.

> In the case at bar, the evidence that plaintiff has adduced with respect to Schwartz is gossamer. Plaintiff's evidence establishes only that Schwartz took Evans' statement and, consistent with Roselle police policy, passed on the information that he obtained to Detective Grabowski for further investigation and action. Plaintiff, moreover, has provided no evidence that Grabowski, the officer assigned to Evans' case, in any way constrained either her general liberty or her freedom of her own accord to seek protection from McKenzie in the civil courts. Plaintiff also has failed to supply any evidence that either Schwartz or Grabowski had custody of McKenzie prior to his initial kidnapping and assault of Evans – a factor that might have triggered a constitutional duty on their parts to assist Evans subsequently in obtaining court protection from him. Indeed, McKenzie, like the individual who murdered the plaintiff's decedent in *Martinez*, was a parolee subject only to the limited control of a state parole board.
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> * * *
>
> Finally, from a more factual perspective, plaintiff has adduced insufficient evidence to create a genuine issue of material fact as to her claim that Grabowski, much less Schwartz, acted so as to create a special relationship with Evans, triggering a constitutional duty to assist her in obtaining protection from McKenzie in the civil courts. Plaintiff has provided no evidence to show, as *DeShaney* would appear to require, that either defendant affirmatively barred the door to the civil courts to Evans, that he otherwise limited her freedom to act on her own behalf, or that he created or exacerbated the danger that McKenzie posed to her.

922 F.2d at 1115-1116; App. at 42, 44. Thus, contrary to what petitioner would have the Court believe, that the Third Circuit misapprehended the applicable legal rules, the court below ruled

against Petitioner because she failed to prove her case in accordance with the rule of law she is advancing. Petitioner's argument regarding access to the courts does not present an important question of law to be decided by the Court. She only presents a factual question which was previously, and correctly, decided by the Third Circuit. As a result, Petitioner's petition should be denied.

CONCLUSION

For the reasons contained herein, Petitioner's petition for writ of certiorari should be denied.

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